IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DARRIN LEE BOWMAN, Appellant.	)	No. 61759-1-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: August 3, 2009

Grosse, J. — The State may amend an information before it rests if the defendant's substantial rights are not prejudiced by the amendment. Here, given evidence establishing that the value of the gasoline Darrin Bowman pumped into canisters was more than $250, the State amended the information before it rested to charge Bowman with second degree theft rather than third degree theft, which was the original charge. Bowman had knowledge that the State might charge him with second degree theft. And, had defense counsel examined the relevant witness as to the transactional price of the gasoline rather than the retail price, the evidence still would have established that the value of the gasoline Bowman pumped into his canisters was more than $250. Bowman's substantial rights were not prejudiced by the amendment of the information. We affirm.

FACTS

Darrin Bowman was charged by third amended information with (1) attempted theft in the first degree, (2) possessing stolen property in the second degree, (3) theft in the second degree, and (4) possessing stolen property in the

first degree.[1] He was convicted as charged. The trial court sentenced Bowman to an exceptional sentence of 70 months based on the court's finding that some of Bowman's convictions would go unpunished as a result of his high offender score.

The charge of attempted theft in the first degree stemmed from an incident at the home of Keith Eager near Renton. On November 26, 2006, Eager was awakened by the sound of someone knocking at his front door. He did not recognize the truck parked in his driveway and did not answer the door. A few minutes later, he heard the truck drive to his father's rental property next door and saw it park behind the house near his father's vehicle trailer that was stored on the property. The driver of the truck, later identified as Bowman, got out of the truck and began hooking the trailer to the truck. Eager called his father, confirmed that no one had permission to pick up the trailer, and walked to his father's property to confront Bowman. Bowman told Eager he was there to pick up the trailer at the request of a person named Jack Frost and handed Eager a handwritten note addressed "to whom it may concern" and stating that Bowman had permission "to haul my trailer from Maple Valley to Orting." Eager told Bowman to unhook the trailer from the truck, and Bowman complied and then left. Eager called his father back, and the father called the police. King County deputy sheriffs arrested Bowman about an hour later. Bowman told the deputy sheriffs that a person named Jack Frost offered him $200 to transport two

[1] One issue on appeal involves the amendment of the information. The details relating to this issue, as well as those relating to the other issues on appeal, will be discussed in greater detail where relevant.

trailers from Maple Valley to Orting.

Bowman's convictions of possessing stolen property in the second degree and theft in the third degree stem from an incident at a Pacific Pride gas station in Kent. On January 24, 2007, Kent police officers responded to a call reporting that someone was spilling gasoline at the station. When the police arrived, they found Bowman pumping gasoline into large canisters that were in the back of a flatbed trailer attached to a truck. Bowman told the officers that a friend named "Mick" paid for the gasoline with a credit card to settle a debt. Bowman would not agree to take the officers to Mick because, according to Bowman, the credit card Mick used belonged to Mick's father, who would not have approved of using his card to pay for the gasoline. The officers discovered that the flatbed trailer had been reported stolen. Bowman told the officers he bought the trailer from a friend, but had no paperwork relating to the sale. Bowman pumped 123.4 gallons of gasoline into the canisters at the retail price of $2.55 a gallon, for a total value of $315.78. The credit card used to pay for the gasoline belonged to a Les Schwab tire store in Ellensburg.

Bowman's conviction of possessing stolen property in the first degree arose from a car rental. On January 22, 2007, Avis/Budget Rent-a-Car rented a 2007 Hummer to someone using a credit card in the name of Glen Kitchin. The Hummer was not returned on the due date. After confirming that Kitchin had not rented the Hummer, Avis/Budget reported it stolen. On February 28, 2007, Bowman was arrested driving the Hummer. Bowman told a detective that he

went to a friend's house a few days earlier to settle a debt. When he returned to his vehicle which was parked at his friend's house, he found a note and a car key on the passenger seat. The note said that a person named "Kenny" had been arrested and left a Hummer in a parking lot near the site of the arrest, and that Bowman could drive the Hummer for a few days. Bowman thought the Hummer might have been stolen, but changed his mind when he found the ignition intact.

ANALYSIS

Amendment of the Information

Originally, the State charged Bowman with two counts of possessing stolen property (the flatbed trailer and the Hummer) and attempted theft (Eager's father's trailer). Before trial, the State amended the information to add a charge of third degree theft (the gasoline). During trial, after testimony that the 123.4 gallons of gasoline Bowman pumped cost $315.78 at the retail price of $2.55 a gallon, the State moved to amend the third degree theft charge to second degree theft. Defense counsel objected to the proposed amendment, but the trial court granted the State's motion to amend. The State could not secure its final witness and rested after amending the information. Bowman argues that the trial court erred by granting the State's motion to amend the information because the amendment denied him the right to be informed of the charges against him and prejudiced his ability to present a defense.

The State may not amend an information after it has rested its case

unless the amended charge is a crime that is a lesser degree of the same charge or a lesser included offense.[2] However, this bright-line rule does not apply where, as here, the State amends the information before it rests. Under such circumstances, the inquiry is whether the defendant's "substantial rights" were prejudiced by the amendment.[3] The defendant has the burden of demonstrating prejudice.[4] We review the trial court's determination as to whether prejudice exists for abuse of discretion.[5]

We find no prejudice in the trial court's allowing the State to amend the information and charge Bowman with second degree theft. First, Bowman was on notice that the State might charge him with second degree theft. Although the State eventually charged Bowman with third degree theft, the State disclosed its intent to move to amend the information to include a charge of second degree theft in its motion to join offenses.[6] Second, at trial, Bowman argued he would be prejudiced by the amendment because, had he known of it prior to trial, he would have questioned Jim Pederson about the transactional price of the gasoline. Pederson testified that Bowman pumped 123.4 gallons of gasoline with a retail price of $2.55 per gallon. The transactional price of the gasoline was $2.29 per gallon. Even using that figure, the value of the gasoline Bowman pumped was over the $250 threshold for second degree theft. The trial court did not abuse its discretion in permitting the State to amend the information to

[2] State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).
[3] State v. Schaffer, 120 Wn.2d 616, 621, 845 P.2d 281 (1993)
[4] State v. Hakimi, 124 Wn. App. 15, 26-27,98 P.3d 809 (2004).
[5] Schaffer, 120 Wn.2d at 621-622.
[6] See Schaffer, 120 Wn.2d at 622.

charge Bowman with second degree theft.

Admissibility of Bowman's Custodial Statements

King County Sheriff Deputies Guy Herndon and Anthony Palmer responded to a call regarding the incident with Eager's father's trailer. They found Bowman driving his truck, stopped him, and took him out of the truck. Deputy Herndon arrested Bowman and read him his Miranda[7] rights. When asked, Bowman said he understood his rights, and Deputy Herndon then turned Bowman over to Deputy Palmer.

Deputy Palmer put Bowman into his patrol car and, after reading him his Miranda rights once again, took a statement from him. In Deputy Palmer's presence, Bowman signed the suspect statement form on the signature line indicating that Deputy Palmer advised him of his Miranda rights. Although Deputy Palmer could not recall the specifics of Bowman's arrest, he testified that his normal procedure is to read a suspect the Miranda rights initially, but to wait to read the waiver portion of the statement form until after the suspect gives a statement. Deputy Palmer did recall asking Bowman, after reading him his rights, whether he would be willing to give a statement. Bowman indicated that he was willing to talk, and Deputy Palmer took Bowman's statement. Bowman either read Deputy Palmer's transcription of his statement or had it read to him, and then signed the waiver of rights portion of the statement. At no point during his conversation with Deputy Palmer did Bowman ask for an attorney, indicate that he did not want to speak, or express confusion about his Miranda rights. In

[7] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

his statement, Bowman explained that Jack Frost offered him money to move trailers and that he went to Eager's father's property because that is where Jack Frost told him he would find one of the trailers.

Bowman moved to suppress his statements to Deputy Palmer. After a CrR 3.5 hearing, the trial court concluded that the statements were admissible because they were made after Bowman knowingly, intelligently, and voluntarily waived his Miranda rights and denied the motion to suppress. Bowman argues that the trial court erred by denying the motion to suppress.

We will affirm a trial court's ruling on a motion to suppress if substantial evidence supports the court's findings of fact and those findings support the court's conclusions of law.[8] We review conclusions of law de novo.[9]

A defendant's waiver of the right to remain silent is valid if the waiver is made knowingly, intelligently, and voluntarily.[10] A valid waiver may be implied from the facts of a custodial interrogation. An implied waiver will be found "where the record reveals that a defendant understood his rights and volunteered information after reaching such understanding" or that the defendant's answers to questions "were freely and voluntarily made without duress, promise or threat and with a full understanding of his constitutional rights."[11] For example, where a defendant is advised of his Miranda rights, manifests an understanding of those rights, and thereafter participates in a

[8] State v. Chang, 147 Wn. App. 490, 495, 195 P.3d 1008 (2008).
[9] Chang, 147 Wn. App. at 495.
[10] Miranda, 384 U.S. at 444.
[11] State v. Terrovona, 105 Wn.2d 632, 646-47, 716 P.2d 295 (1986).

discussion with detectives, the defendant will be found to have impliedly waived his Miranda rights.[12]

Here, in unchallenged findings, the trial court found that both Deputy Herndon and Deputy Palmer advised Bowman of his Miranda rights.[13] Bowman understood his rights and at no point manifested confusion about them or asked to speak with an attorney. Thereafter, he participated in a discussion with Deputy Palmer. Under these circumstances, we conclude that Bowman knowingly, intelligently, and voluntarily waived his Miranda rights. The trial court did not err in holding Bowman's statements to Deputy Palmer admissible.

Prosecutor's Statements During Opening

Bowman argues that his conviction must be reversed because the prosecutor committed misconduct during opening statement by making the following statements:

> [PROSECUTOR]: Thank you, your Honor. Good morning. During voir dire, I mentioned a couple of phrases that, "Fool me once, shame on me. Fool me twice, shame on you." "If it seems too good to be true, it probably is." Over the weekend, as I was preparing my case, I thought of another saying that I think holds true.
>
> [DEFENSE COUNSEL]: Objection, your Honor. Could we have a sidebar?
>
> THE COURT: Okay. Excuse us, please.
>
> (Sidebar held.)
>
> THE COURT: You may proceed.

[12] Terrovona, 105 Wn.2d at 647.
[13] Unchallenged findings made after a CrR 3.5 hearing are verities on appeal. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

> [PROSECUTOR]: Thank you, your Honor. The other phrase or saying that I thought about a bit over the weekend was that, "Lightening doesn't strike twice." And in this case, it actually struck three times, on three separate occasions."

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.[14] The conduct is prejudicial only if there is a substantial likelihood that the conduct affected the jury's verdict.[15] Bowman argues that the prosecutor's statements were prejudicial because they "set the tone" for the trial by telling the jury to view Bowman's explanations with skepticism.

Bowman has failed to establish any prejudice even if the prosecutor's statements could be viewed as improper.[16] The statements likely had little or no effect on the jury's verdict, as they were made at the outset of the multiple-day trial. The statements are not, as Bowman argues, similar in effect to the statements at issue in State v. Echevarria.[17] There, the prosecutor spoke at length during his opening statement about the "war on drugs," referencing the "battlefield[s]" that are our neighborhoods and schools, and the Gulf and Vietnam wars.[18] The Echevarria prosecutor urged the jury to convict the defendant, not on the basis of the evidence, but rather on the basis of fear and repudiation of drug dealers. The prosecutor's statements in Echevarria were

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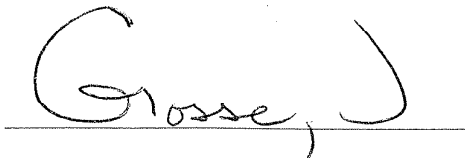
[14] State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003).
[15] State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).
[16] During opening statement, a prosecutor may state what the State's evidence is expected to show. State v. Brown, 132 Wn.2d 529, 563, 940 P.2d 546 (1997).
[17] 71 Wn. App. 595, 860 P.2d 420 (1993).
[18] Echevarria, 71 Wn. App. at 596-98.

highly inflammatory and prejudicial. We cannot say the same about the prosecutor's statements here. Given the evidence presented and the circumstances at trial, there is not a substantial likelihood that the prosecutor's statements affected the jury's verdict.

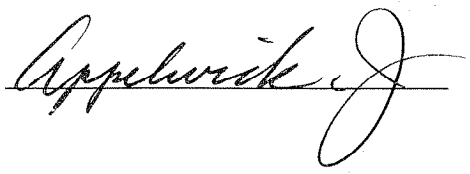
Pro Se Issues

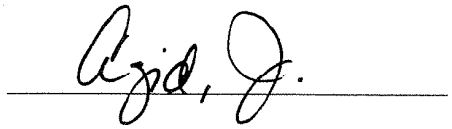
Bowman filed a statement of additional authorities in which he lists four additional grounds for review. He has not, however, supported his additional grounds with legal argument. We are therefore unable to review Bowman's additional grounds for review.[19]

We affirm.



WE CONCUR:





[19] See RAP 10.10(c).